Supreme Court, U.S.
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CASE NO.: _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

DR. JAMES FRANKLIN ET AL.,

APPELLANTS,

VS.

GOVERNOR DAVID BEASLEY, ET AL.

APPELLEE.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

JURISDICTIONAL STATEMENT

JOHN R. HARPER II
COUNSEL OF RECORD
POST OFFICE BOX 843
COLUMBIA, SOUTH CAROLINA 29202-0843
(803) 771-4723

BRENDA REDDIX-SMALLS
ELEAZER R. CARTER
POST OFFICE BOX 2073
COLUMBIA, SOUTH CAROLINA 29202
(803) 779-2545
ATTORNEYS FOR APPELLANTS

QUESTION PRESENTED

Whether Voting Rights Plaintiffs who attain the releif they seek through Defendants' voluntary action qualify for attorney fees pursuant to 28 U.S.C. § 1988 by way of the catalyst theory, notwithstanding the Fourth Circuit's interpretation of Farrar v. Hobby, ___ U.S. ___, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), and S-1 and S-2 v. State Bd. of Educ. of North Carolina, 21 F. 3d 49 (4th Cir. 1994), where such voluntary action renders the Plaintiffs' lawsuit moot.

PARTIES TO THE PROCEEDING

Dr. James Franklin, Jerry Dicks, Norman Gamble, Julia McFadden, James E. Shaw, Alvin O. White, Robin Cooper, by and through her parent and next friend, Patty Cooper, Vertanza O. Cunningham, by and through her parent and next friend, Valtricia L. Cunningham, Pembv Graham, by and through her parent and next friend, Martha Graham, Shirrisa White, by and through her parent and next friend, Alvin White, David Beasley, Jeffrey Lawrimore, George Sutton, Wesley Kennedy, James Guy, Sarah Gallaway, M.B. Lee, Terry Welch, the Mayor and Town Council of Hemingway, South Carolina, the Election Commission of Hemingway, South Carolina, Manning Patterson, Betty Patterson, the Election Commissioners of Hemingway, South Carolina, Wesley Kennedy, Edwin Huggins,

Willard Lawrimore, and the Hemingway Annexation Steering Committee were the only parties to this action in the United States District Court for the District of South Carolina.

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IN THE SUPREME COURT OF THE UNITED STATES

October, Term 1994

Dr. James Franklin, et. al.

Appellants,

v.

Governor David Beasley, et. al.,

Appellees.

JURISDICTIONAL STATEMENT

The Appellants Dr. James Franklin, et al. respectfully appeal the decision and final judgment of the United States District Court, Three Judge Panel for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the three judge panel of the United States District Court for the District of South Carolina

is unreported.

JURISDICTION

The Three Judge Panel empaneled by the Fourth Circuit Court entered a final order denying the appellants motion for attorneys fees on March 10, 1995. Appellants filed their Notice of Appeal on March 27, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 2284 and 42 U.S.C. § 1973c.

STATUTORY PROVISION INVOLVED

The Civil Rights Attorneys Fees Awards Act of 1976, 90 Stat. 2641, 42 U.S.C. § 1988, provides in part that:

> **In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, Title IX of the Revised Statutes, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et. seq.] the court, in its discretion, may allow the prevailing party, other than the United States,**

a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1973l(e) provides:

In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT

On October 19, 1993, plaintiff James Franklin and other named plaintiffs sued the Defendant, Governor, Mayor and Town Council of Hemingway and a private citizens group, the Hemingway Annexation Steering Committee.

The plaintiffs alleged that the Defendant(s) Town of Hemingway and its officers committed alleged violations of the Sections 2 and 5 of the 1965 Voting Rights Act (1) by illegally annexing at least five areas into the town limits

without obtaining the requisite preclearance from the Department of Justice; (2) by being part of an effort to secede from the predominantly black populated Williamsburg County into adjacent Florence County without affording the African-American citizenry the opportunity to participate equally as other citizens in the voting process; and (3) by refusing to annex predominantly black areas into its town limits while annexing areas populated by white citizens.

The Plaintiffs alleged that the Defendant Governor violated Section 2 and 5 of the Voting Rights Act by failing to gain the requisite preclearance on referenda which allowed the voters of Florence and Williamsburg County to determine if the Hemingway

area could secede from Williamsburg County.[1]

The plaintiffs requested injunctive and declaratory relief against the January 18, 1994 scheduled referendum concerning the proposed annexation of a section of Williamsburg County, which included the Town of Hemingway and adjacent area, into Florence County.

Plaintiffs also sought a declaration that the actions of the named defendants in connection with the proposed January 18, 1994, referendum on the annexation violated Section 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 and 1973c, and an Order

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[1] Initially, the Governor scheduled a referendum on secession from Williamsburg County for January, 1994. After the plaintiffs filed suit, the Governor re-scheduled the referendum for March, 1994.

requiring preclearance of all matters pertaining to annexation.

The District Court appointed a Three Judge Panel to hear and determine issues related to the 42 U.S.C. § 1973, section 5 preclearance issues and the injunctive relief requested by the appellants.

In a companion case, NAACP v. Town of Hemingway, (filed on October 18, 1994,) on identical issues, the same Three Judge Panel entered an Order granting the plaintiffs' summary judgment on the Section 5 issues with respect to the Defendant Town of Hemingway and its failure to obtain pre-clearance on the five annexation areas.

In the instant case, the parties (Appellants and the Respondent Town of Hemingway and its officers) adopted the

findings of the Consent Order on Section 5 issues in the companion case; the current Section 5 issues with respect to the Defendant Town of Hemingway and its officers were then determined to be moot based upon the agreement of the parties.

The Plaintiffs submitted the lawsuit(s) and objections to the Department of Justice, objecting to the preclearance of the countywide annexation referendum and the annexations into the Town of Hemingway; said annexations being submitted for preclearance by the Town after the filing of the lawsuits. (The Justice Department refused to initially preclear the County wide annexation referenda because of information received that the Town had not obtained preclearance on its series of annexations.) The Justice

Department received that information from the Plaintiffs. The Justice Department found that the annexations into the Town of Hemingway and the annexation submitted for preclearance within the Governor's referenda were inextricably connected. The Justice Department requested that the Defendant Town of Hemingway submit the previously annexed areas to them for a determination that the changes did not have the effect of denying or abridging the right to vote on account of color.)

On July 22, 1995, the Department of Justice refused to issue pre-clearance on (1) the five areas annexed into the Town of Hemingway and (2) the proposed referendum allowing the annexation of a portion of Williamsburg County to secede to Florence County. In objecting to the

annexations, the Department of Justice stated that the annexations into the town and the secession of the town into Florence County were intertwined, and that the Attorney General could not issue an administrative determination that both (1) the five annexations and (2) the county annexation referenda did not have the purpose and effect of denying or abridging the right to vote on account of color.

The Governor then informed the Court that the referendum would not be held because preclearance had not been received.

The Town of Hemingway agreed (previously) to de-annex the areas (five) from within its town limits.

The parties agreed that the issues requested were now mooted.

Upon dismissal of the instant case for mootness, the plaintiffs moved for an order granting them attorneys fees on the Section 5 issues. The Three Judge Panel entered an order denying the plaintiffs request for attorneys fees against the Town of Hemingway and its officers based upon the Fourth Circuit Court of Appeals ruling in S-1 & S-2 v. State Bd. of Educ. of North Carolina, 21 F.3d 49 (4th Cir. 1994), which interpreted Farrar v. Hobby, _____U.S._____, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), to exclude the grant of attorneys fees where the plaintiff has not received an enforceable judgement, consent decree or settlement.

The plaintiffs appeal the decision of the Three Judge Panel and assert that

Farrar does not preclude the grant of the attorneys fees and costs.

ARGUMENT

THE QUESTIONS ARE SUBSTANTIAL

A. VOTING RIGHTS CASES AND PREVAILING PARTY STATUS

The question presented is whether a Plaintiff may be a prevailing party without an enforceable judgment, settlement or consent decree, particularly when plaintiffs' actions have achieved a significant result which affords them some of the relief sought.

This case involves the interpretation of 42 U.S.C. § 1988 and 42 U.S.C. § 1973l(e), with respect to when a party may be considered a prevailing party, in light of Farrar v. Hobby, ___U.S.___, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), and the Fourth Circuit's application of the same in S-1

& S-2 v. State Bd. of Educ. of North Carolina, 21 F.3d 49 (4th Cir. 1994) and subsequent cases.

The Court's decisions as to when and how a party may be determined as a prevailing party is important and substantial, particularly in Voting Rights cases where parties are seeking to protect basic fundamental rights.

> **Civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional polices which these laws contain. In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it**

> **costs them to vindicate these rights in court.**

S. Rep. No. 1011, 94th Cong., 2d Sess. 3, reprinted in 1976 U.S. Code Cong. & Admin. News 5910.

In 1796 the Supreme Court identified the American rule of attorneys fees which provided that each party was responsible for their legal fees and no award of attorney fees was to be made absent express statutory authority to the contrary. Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796); Hensley v. Eckerhart, 461 U.S. 424, 439 (1983). Several exceptions to the American rule were set out by the Supreme Court in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1970).

On June 11, 1975, the Voting Rights attorney fees provision, 42 U.S.C. §

19731(e) was added to the Voting Rights Act Extension. S.REP. No. 295, 94th Cong., 1st Sess. 10, reprinted in 1975 U.S.Code Cong. & Admin. which created fee-shifting provisions for the enforcement of voting rights violations. The statute authorized the award of attorneys fees to the prevailing party for the enforcement of voting rights.

The Civil Rights Attorney's Fees Awards Act of 1976, Pub.L. No.94-559 (1976), 90 Stat 264 (codified as amended at 42 U.S.C. Sec. 1981, 1988 (1982) incorporated a significant portion of the Senate Report on the Voting Rights Act Extension of 1975, and re-iterated Congressional intent to award counsel fees in cases for the enforcement of civil rights.

The Voting Rights Act attorney fee provision and the Civil Rights Fees Act are essentially identical and construction of one applies to the construction and interpretation of the other. Leroy v. City of Houston (Leroy III), 831 F.2d 576, 579 n.4 (5th Cir. 1987), cert. denied, 108 S.Ct. 1735 (1988); Arriola v. Harville, 781 F.2d 506 (5th Cir. 1986), cert denied 479 U.S. 820(1986)("the attorney's fee provisions of section 1988 and the Voting Rights Act are interpreted together").

The issue of when a party is a prevailing party for purposes of fee award must be statutorily construed. 42 U.S.C.§ 1988(b) limits eligibility for its award to a "prevailing party" in the statutory sense. Hewitt v. Helms, 482

U.S. 755, 760, 107 S.Ct. 2672, 2675, 96 L.ed.2d 654 (1987).

In Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed 2d 40 (1983), the Supreme Court addressed the application of the attorney's fees provision of § 1988.

In Hensley patients who were involuntarily confined to a state mental hospital challenged the constitutionality of some of the institutions rules and practices. The respondents challenged six general policy areas based on constitutional infirmities. In five of the six, the District Court found constitutional defects. The patients then requested a fee award pursuant to § 1988. The District Court determined that the respondent patients were prevailing

parties under 42 U.S.C. § 1988 even though they had not succeeded on every claim. Id. at 428, 103 S.Ct. at 1937, cited in Texas State Teachers v. Garland Indep. School Dist., 109 S.Ct 1486 at 1491. The Court of Appeals affirmed this award.

The Supreme Court sought to set out "the proper standard for setting a fee award where the plaintiff has achieved only limited success. Id., at 431, 103 S.Ct. at 1938. The Court stated that "a typical formulation is that plaintiffs may be considered prevailing parties for attorneys fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." Id. at 433, 103 S.Ct. at 1939, cited in Texas State Teachers 109 S.Ct. at 1492.

The Supreme Court in Texas State Teachers Ass'n v. Garland Independent Sch. Dist., 489 U.S. 782, 792-93, 109 S.Ct. 1486, 1494 stated:

The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties.

That touchstone is necessary to confer "prevailing party" status to a litigant. Kentucky v. Graham, 473 U.S. 159, 165, 105 S.Ct. 3099, 3104, 87 L.Ed. 2d 114 (1985).

In Texas, the Court stated that the standard for finding prevailing party status requires only that parties succeed on any significant issue in the litigation which achieves some of the benefit they sought in bringing the suit. Nadeau v. Helgemoe, 581 F. 2d

275, 278-279, quoted in Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed. 2d 40.

The issue in the Texas teacher case, involved a delineation as to who can be considered a prevailing party (it did not involve the catalyst theory.) There, the plaintiffs, who were school teachers and their associations, challenged a school regulation forbidding contact with employee organizations and discussions about the union during the school day. The restriction on communications by union representatives during school hours was upheld, but the restriction on teacher to teacher discussion during the school day about the union was declared unconstitutional. The plaintiffs request for attorney's fee was rejected,

based on the Fifth Circuit's determination that a plaintiff must prevail on the central issue in the litigation and achieve the primary relief sought to be eligible for an award for attorney's fees under § 1988.

In Texas State Teachers, the Supreme Court soundly rejected this "central issue" test, and stated that "the degree of the plaintiff's success in relation to the other goals of the lawsuit is a factor critical to the determination of the size of a reasonable fee, not to be eligible for a fee award at all." Id. at 790, 109 S.Ct. at 1492. The Court reiterated Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40, that the plaintiff need only succeed on a significant issue

in the litigation and receive some of the benefit sought in bringing the suit.

The Court in Texas State Teachers went on to hold "thus at a minimum, to be considered a prevailing party within the meaning of 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." 489 U.S. at 792, 109 S.Ct. at 1493.

Further, in discussion the Supreme Court stated, **"the touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute."** Id. at 792-93, 109 S.Ct. at 1494.

It has been long recognized by the Supreme Court that a plaintiff may be a prevailing party for purposes of § 1988 even if the defendant voluntarily provides the relief sought rather than litigating the suit to judgment. See, e.g. Stewart v. McGinnis, 5 F.3d 1031, 1039 (7th Cir. 1993), cert. denied, -- U.S. ---, 114 S.Ct. 1075, 127 L.Ed.2d 393 (1994).

The Supreme Court has further recognized that fees can be appropriately awarded when a suit has been mooted due to the defendant's voluntary action.

In Hewitt v. Helms, 482 U.S. 755, 760-61, 107 S.Ct. 2672, 2675-76, 96 L.Ed. 2d 654 (1987), the Court noted:

> **It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under**

§ 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through judgement-e.g., a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor. (citing Maher v. Gagne, 448 U.S. 122, 129, 100 S.Ct. 2570, 2574, 65 L.Ed. 2d 653 (1980)).

Further the Hewitt Court states:

In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action or cessation of action by the defendant that the judgment produces-the payment of damages, or some specific performance, or the termination of some conduct. 482 U.S. at 761, 107 S.Ct. at 2676.

B. THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS IN S-1 AND S-2 AND ITS INTERPRETATION OF FARRAR IS ERRONEOUS.

The Fourth Circuit in its reading of Farrar v. Hobby, _____U.S._____, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), concluded that a voluntary change in the defendant's behavior could no longer suffice to confer prevailing party status, and that plaintiffs could not receive fees unless they had obtained an enforceable judgment. S-1 and S-2 v. State Bd. of Educ. of N. Carolina, 21 F.3d 49 (4th Cir. 1994).

The Supreme Court in Farrar v. Hobby did not address whether a plaintiff may be a prevailing party for purposes of § 1988 when the defendant voluntarily provides the relief sought rather than litigation the suit to judgment.

Farrar discussed whether a plaintiff who had received nominal damages could be considered a prevailing party for purposes of § 1988.

Thus, the Fourth Circuit's reading of Farrar extends further than the holding issued by the Supreme Court.

The Court held that although such plaintiffs were indeed prevailing parties they were not entitled to attorney's fees. The Farrar Court held, **"to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom the fees are sought.** Hewitt v. Helms, 482 U.S. 755, 760, 107 S.Ct. 2672, 2675-2676, 96 L.Ed. 2d 654, or comparable relief through a consent

decree or settlement, Maher v. Gagne, 448 U.S. 122, 129,--U.S. at --, 113 S.Ct. at 573.

The language of Farrar may lead to a conclusion that the catalyst theory is unavailable on the facts of that case, but the Supreme Court did not overrule the catalyst theory for determining prevailing party status in an attorneys fees request.

The issue for resolution in Farrar v. Hobby, 113 S.Ct. 566 (1992) was whether a civil rights plaintiff who receives a nominal damages award is a "prevailing party" eligible to receive attorney's fees under 42 U.S.C. 1988. In Farrar, the Court of Appeals for the Fifth Circuit reversed an award of attorney's fees on the ground that a plaintiff receiving only nominal damages

is not a prevailing party. The Supreme Court held that such a plaintiff is a prevailing party, but affirmed the denial of fees in that case.

The Farrar plaintiffs were the owners and operators of a school for delinquent and disturbed teenagers. One of their students died in 1973, and a grand jury returned a murder indictment against the plaintiff for failure to administer proper medical treatment. The State obtained injunctive relief to close the school.

The then Lieutenant Governor was instrumental in events which led to the closing of the school. The Defendant Lieutenant Governor issued a press release criticizing the governmental agencies which issued a license to the plaintiff, called for the additional

investigation of the school, and accompanied the governor on a school inspection. Finally, the Lieutenant Governor attended the injunction hearing and spoke with reporters afterwards.

The plaintiff Farrar sued the Defendant Lt. Governor, a judge a county attorney and other government officials for monetary and injunctive relief pursuant to 42 U.S.C. §§ 1983 and 1985.

At a trial before the jury, Farrar obtained only a nominal damage award of one dollar; the jury returned no money damages, declaratory relief or injunctive relief.

The plaintiffs sought attorneys fees under 42 U.S.C. § 1988. The District Court awarded the plaintiffs fees. A divided Fifth Circuit panel reversed the fee award.

The Supreme Court granted cert. Further, the Supreme Court held that a plaintiff who wins nominal damages is a prevailing party under § 1988. The Court held that the award of nominal damages was a technical victory.

The Court had to decide whether a nominal damages award is the sort of technical insignificant victory that cannot confer prevailing status. The Court held that **"the prevailing party inquiry does not turn on the magnitude of the relief obtained."** Id. at 574.

Further, that the technical nature of a nominal damages award or any judgement does not affect the prevailing party inquiry, it does bear on the propriety of fees award under 1988. Id. at 575.

The Supreme Court has ruled consistently that the prevailing party entitled to award of attorney fees in civil rights action must be one who has succeeded on any significant claim affording some of the relief sought. That to be considered a prevailing party entitled to an award of attorney fees in civil rights action, plaintiff must be able to point to the resolution of a dispute which changes the legal relationship between itself and the defendant.

Further, that the touchstone of the prevailing party inquiry for purposes of attorney fee award in civil rights action must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute; where such

change has occurred, the degree of plaintiffs' overall success goes to the reasonableness of the award, not to the availability of a fee. 42 U.S.C. § 1988.

In S-1 and S-2, 21 F.3d 49 (4th Cir. 1994), a sharply divided Fourth Circuit Court of Appeals sitting en banc decided that a person may not be a prevailing party plaintiff under 42 U.S.C. § 1988 except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the regal relief sought in a 1983 action. Citing Farrar v. Hobby, --- U.S.---.. 113 S.Ct. 566, 121 L.Ed. 2d 494 (1992).

In S-1 the parents of handicapped students had brought a 1983 action seeking tuition reimbursement and

injunctive and declaratory relief with respect to the state board of education's refusal to allow hearing officers to award tuition reimbursement. The District Court granted summary judgment for the parents and an appeal was taken. The Court of Appeals found that the parents settlement with the City Board of Education mooted the appeal and remanded. The District Court awarded parents attorney fees against the state board and an appeal was taken. The Court of Appeals, affirmed. Upon granting a petition for rehearing en banc, the Court of Appeals held that: (1) plaintiff could not be considered a prevailing party under 1988 except by virtue of having obtained enforceable judgment, consent decree or settlement giving some legal relief sought in 1983

action; and (2) the catalyst theory is no longer available to establish plaintiff's status as a prevailing party.

The Fourth Circuit reasoned that:

> **No material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree or settlement against the Defendant.** Id. --U.S.--, 113 S.Ct. at 574.

Based upon the foregoing, the Fourth Circuit concluded that a voluntary change in the defendant's behavior could no longer suffice to confer prevailing party status, and that plaintiffs could not receive fees unless they had obtained an enforceable judgment., 21 F.3d 49, at 50 (4th Cir. 1994).

Applying this interpretation of Farrar and S-1 and S-2, the Three Judge

Panel concluded that the plaintiffs nor the defendants had obtained an enforceable judgment, consent decree or settlement, and, therefore, prevailing party status could not be conferred. Therefore, the court denied plaintiffs (and defendants) requests for attorneys fees.[2]

First, it is settled law that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit may produce voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment, a monetary settlement or a change in the conduct that redresses the plaintiff's grievances. When that occurs, the

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[2] This is not the proper standard by which defendants are awarded attorney's fees.

plaintiff is deemed to have prevailed despite the absence of a formal judgment. See, Maher v. Gagne, 448 U.S. 122, 129, 100 S.Ct. 2570, 65 L.Ed. 2d 653 (1980).

In the Fourth Circuit's application of Farrar and S-1 & S-2, the Court has completely overlooked that the Appellants here have achieved most if not all of the relief sought. Chief among the relief sought by the appellants, the following results were achieved: (1) they sought to have the five areas precleared with the Department of Justice; (2) they sought injunctive relief against an action surrounding a January 18, 1994 (and subsequent) referendum concerning the proposed annexation of a section of Williamsburg County into Florence

County; (3) they sought an Order requiring preclearance of all matters pertaining to the annexation; (4) they sought the de-annexation of the unprecleared areas from the Town of Hemingway; and, (5) they sought to stop the referenda annexing part of Williamsburg County into Florence County. But because the lawsuit was mooted by the defendants' voluntary compliance, the Fourth Circuit denied the plaintiffs-appellants request for attorneys fees. The plaintiffs in this lawsuit achieved a material alteration of the legal relationship between the parties. Further, the plaintiffs' lawsuit was causally connected to the defendants' compliance with Section 5 of the Voting Rights Act.

The Fourth Circuit has overruled the catalyst theory as a basis for awarding fees for a lawyers services. The catalyst theory stated simply:

> **A plaintiff may prevail in the absence of a judicial determination on the merits; in such circumstances the catalyst test is used to determine prevailing party status for attorneys fees. A plaintiff must show (1) that the lawsuit is causally linked to securing the relief obtained; and (2) that the defendant's conduct in response to the lawsuit was required by law.**

The Fourth Circuit stands solo in its interpretation of Farrar as rendering any catalyst theory nonviable as a basis for awarding fees for a lawyer's services that do not produce an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement.

All other Circuits have continued to speak in catalyst terms. Guglietti v. Secretary of Health and Human Services 900 F.2d 397 (1st Cir. 1990)(litigant must enjoy litagatory success or her suit must have had catalytic effect in bringing about desired result); Gerena-Valentin v. Koch 739 F.2d 755 (1984)(to justify award of attorney fees under the Voting Rights Act, prevailing party must show causal connection between relief obtained and litigation in which fees are sought; causal connection exist if plaintiff's lawsuit was a catalytic, necessary, or substantial factor in attaining relief); Baumgartner v. Harrisburg Hous. Auth. 21 F.3d 541, 549-50 (3d Cir 1994)(given the importance that the catalyst theory long has had in prevailing party doctrine under 42

U.S.C. § 1988, we would expect that if the Court intended to hold it no longer a viable theory it would address the issue head-on in a case in which it was dispositive); Craig v. Gregg County, 988 F.2d 18 (5th Cir. 1993)(the plaintiff could prevail on a catalyst basis in an appropriate case); Pembroke v. Wood County 981 F.2d 225, 230-31 (5th cir.) cert. denied, __U.S., 113 S.Ct. 2965, 125 L.Ed. 2d 665 (1993)(court awarded fees under the catalyst theory); Citizens Against Tax Waste v. Westerville School, 985 F.2d 255 (6th Cir. 1993) (catalyst theory viable; the question to answer in plaintiffs quest for fees is whether plaintiffs have accomplished a material alteration of the legal relationship of the parties); Stewart v. McGinnis 5 F.3d 1031 (7th

Cir. 1993)(plaintiffs lawsuit must causally linked to the achievement of the relief obtained); Nanetti v. University of Illinois At Chicago , 867 F.2d 990 (7th Cir. 1989) (Civil Rights plaintiffs may be considered prevailing parties for attorney fee purposes if they succeed on any significant issue in litigation which achieves some of the benefit the party sought in bringing suit); Little Rock School Dist. v. Special School Dist. 1 17 F.3d 260 (8th Cir. 1994)(when defendant voluntarily complies with plaintiff's requested relief, thereby rendering plaintiff's lawsuit moot, plaintiff is prevailing party under statute governing award of attorneys fees and expert fees in civil rights case if his suit is catalyst for defendants voluntary compliance);

Luethje v. Peavine School Dist. of Adair County; 872 F.2d 352 (10th Cir. 1989)(civil rights plaintiff who does not receive judicial determination on the merits but who obtains relief from a defendant qualifies as a "prevailing party" entitled to attorney's fees if he or she shows that lawsuit is causally linked to securing relief obtained and that defendants conduct in response to lawsuit was required by law); Fields v. City of Tarpon Springs, Fla, 721 F.2d 318 (11th Cir. 1983)(under Civil Rights Attorneys Fees Awards Act, party may prevail without obtaining judicial relief; catalyst test applied to determine whether party is prevailing party); Public Citizen Health Research Group v. Young 909 F.2d 546 (D.C. 1990)(party need not procure final

judgment on the merits in order to be considered prevailing party; it is enough that lawsuit was a causal, necessary or substantial factor in obtaining result plaintiff sought).

C. THE QUESTION PRESENTED IS IMPORTANT

The Courts and Congress have recognized the importance of the award of attorneys fees to plaintiffs seeking relief and protection of constitutional liberties.

The cases reported in almost all of the Circuits indicate that the Fourth Circuit stands nearly alone in its disavowal of the catalyst theory of recovery for attorneys fees.

Such a position taken in direct opposition to the rulings by the various Circuits requires that the Supreme Court review and address the uncertainty

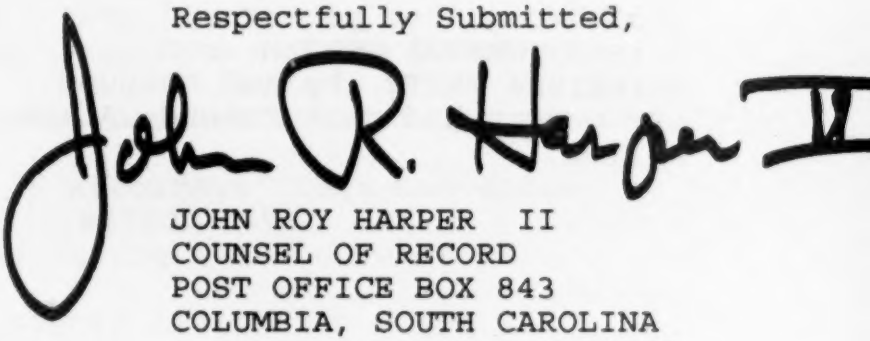
poised by Farrar and the Fourth Circuit. Therefore the Supreme Court should hear the case and reverse summarily.

CONCLUSION

The Court should note probable jurisdiction of this appeal.

DATED June 9, 1995

Respectfully Submitted,



JOHN ROY HARPER II
COUNSEL OF RECORD
POST OFFICE BOX 843
COLUMBIA, SOUTH CAROLINA
29202
(803) 771-4723

BRENDA REDDIX-SMALLS
ELEAZER R. CARTER
POST OFFICE BOX 2073
COLUMBIA, SOUTH CAROLINA
29202
(803) 779-2545
ATTORNEYS FOR APPELLANTS

App. 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

FLORENCE DIVISION
C/A No. 4:93-2760-21

Dr. JAMES FRANKLIN, Superintendent; JERRY DICKS, NORMAN GAMBLE, JULIA MCFADDEN, JAMES E. SHAW, ALVIN O. WHITE, Boardmembers; ROBIN COOPER by and through her parent and next friend, PATTY COOPER, VERTANZA O. CUNNINGHAM, by and through her parent and next friend VALTRICIA L. CUNNINGHAM; PEMBV GRAHAM, by and through her parent and next friend, MARTHA GRAHAM; and SHIRRISHA WHITE, by and through her parent and next friend, ALVIN WHITE,

Plaintiffs,

v.

CARROLL CAMPBELL, Governor of South Carolina; JEFFREY LAWRIMORE, GEORGE SUTTON, WESLEY KENNEDY, JAMES GUY, SARAH GALLAWAY, M. B. LEE, JR., AND TERRY WELCH, Mayor and Council Members respectively of Hemingway, South Carolina; MAYOR and TOWN COUNCIL OF HEMINGWAY; ELECTION COMMISSION OF HEMINGWAY; MANNING PATTERSON AND BETTY PATTERSON, Election Commissioners of Hemingway; EDWIN HUGGINS, WILLARD LAWRIMORE, J. WESLEY, Members of the

App. 2

Hemingway Annexation Steering Committee; and the HEMINGWAY ANNEXATION STEERING COMMITTEE,

Defendants.

ORDER

This matter comes before the court upon petitions for attorneys' fees by Plaintiffs, Defendant Carroll Campbell, and Defendant Hemingway Annexation Steering Committee and its members. Each seeks compensation for the entire amount of attorneys' fees and costs incurred during the course of this voting rights litigation. See 42 U.S.C.A. § 19731(e) (West 1994); id. § 1988 (West 1981).

Requests for fees under § 19731(e) and § 1988 are governed by the same standard. See Riddell v. National Democratic Party, 624 F.2d 539, 543 (5th Cir. 1980). Both sections provide that

"the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as a part of the costs." 42 U.S.C.A. §§ 1973l(e), 1988. As is evident from the language of the statutes, the threshold determination in awarding fees to any party under either section is whether the party is a "prevailing party." Cf. Hensley v. Eckehart, 461 U.S. 424, 433 (1983). In S-1 & S-2 v. State Bd. of Educ. of North Carolina, 21 F.3d 49, 51 (4th Cir.) (en banc), cert. denied, 115 S. Ct. 205 (1994), the Fourth Circuit held "[a] person may not be a 'prevailing party' plaintiff under 42 U.S.C. § 1988 except by virtue of having obtained an enforceable judgment, consent decree, or settlement." We conclude that this standard is equally applicable in

determining whether a defendant is a "prevailing party." See Lotz Realty Co. v. United States Dept. of Housing and Urban Dev., 717 F.2d 929, 931-932 (4th Cir. 1983) (recognizing that the first step in determining whether a defendant is entitled to an award of attorneys fees under § 1988 is an examination of whether the defendant is a "prevailing party"). Therefore, the court may not award attorneys' fees to Plaintiffs, Defendant Carroll Campbell, and Defendant Hemingway Annexation Steering Committee and its members unless each demonstrates that it has obtained an enforceable judgment, consent decree, or settlement.[1]

---

[1] Although the court instructed that "[a]ny party which petitions the Court for attorneys' fees must do so in accordance with the law set for the in the en banc opinion of the United States

By an order entered September 29, 1994, this three-judge district court empaneled to hear Plaintiffs' claims under § 5 of the Voting Rights Act, see 42 U.S.C. § 1973(c) (West 1994), dismissed those claims as moot. None of the parties obtained an enforceable judgment, consent decree, or settlement. As a result, neither Plaintiffs, Defendant Carroll Campbell, nor Defendant Hemingway Annexation Steering Committee and its members are entitled to attorneys' fees and costs arising out

---

Court of Appeals for the Fourth Circuit in S-1 & S-2 v. State Bd. of Educ. of North Carolina, 21 F.3d 49, 51 (4th Cir. 1994)," none of the parties cited S-1 and S-2 in their memorandum in support of their petitions for fees. Plaintiffs did cite the panel opinion in S-1 and S-2 in support of their reliance on the catalyst theory, but the panel opinion was vacated and the catalyst theory was expressly overruled by the en banc court. See S-1 and S-2, 21 F.3d at 51.

of the § 2 claims.

THEREFORE, IT IS ORDERED that the request of plaintiffs and the request of Defendant Carroll Campbell for attorneys' fees incurred in connection with the § 5 claims be denied.

IT IS SO ORDERED.

/s/
Karen J. Williams
United States Circuit Judge

/s/
Dennis W. Shedd
United States District Judge

/s/
William B. Traxler, Jr.
United States District Judge

January 9, 1995
Florence, South Carolina

IT IS FURTHER ORDERED that the request of Plaintiffs, the request of Defendant Carroll Campbell, and the

request of Defendant Hemingway Annexation Steering Committee and its members for attorneys' fees incurred in connection with the § 2 claims be denied.

IT IS SO ORDERED.

/s/
William B. Traxler, Jr.
United States District Judge

January 9, 1995
Florence, South Carolina

App. 8

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

FLORENCE DIVISION
C/A No. 4:93-2760-21

Dr. JAMES FRANKLIN, Superintendent; JERRY DICKS, NORMAN GAMBLE, JULIA MCFADDEN, JAMES E. SHAW, ALVIN O. WHITE, Boardmembers; ROBIN COOPER by and through her parent and next friend, PATTY COOPER, VERTANZA O. CUNNINGHAM, by and through her parent and next friend VALTRICIA L. CUNNINGHAM; PEMBV GRAHAM, by and through her parent and next friend, MARTHA GRAHAM; and SHIRRISHA WHITE, by and through her parent and next friend, ALVIN WHITE,

Plaintiffs,

v.

CARROLL CAMPBELL, Governor of South Carolina; JEFFREY LAWRIMORE, GEORGE SUTTON, WESLEY KENNEDY, JAMES GUY, SARAH GALLAWAY, M. B. LEE, JR., AND TERRY WELCH, Mayor and Council Members respectively of Hemingway, South Carolina; MAYOR and TOWN COUNCIL OF HEMINGWAY; ELECTION COMMISSION OF HEMINGWAY; MANNING PATTERSON AND BETTY PATTERSON, Election Commissioners of Hemingway; EDWIN HUGGINS, WILLARD LAWRIMORE, J. WESLEY, Members of the

App. 9

Hemingway Annexation Steering Committee; and the HEMINGWAY ANNEXATION STEERING COMMITTEE,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that all Plaintiffs in the above case hereby appeal to the United States Supreme Court, from an Crder entered in this action on or about the 15th day of March, 1995, relating to attorneys' fees, Section 5 claims.

REDDIX-SMALLS & CARTER LAW FIRM

/s/
JOHN R. HARPER, IV, ESQ.

BY: /s/
BRENDA REDDIX-SMALLS, ESQ
FED. ID. NO.: 3226

App. 10

/s/
ELEAZER R. CARTER, ESQ.
1921 Barnwell Street
Post Office Box 2073
Columbia, SC 29202
(803) 779-2545
Fed. Id. No.: 5086

Columbia, South Carolina

March 27, 1995

App. 11

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

FLORENCE DIVISION
C/A No. 4:93-2760-21

Dr. JAMES FRANKLIN, Superintendent; JERRY DICKS, NORMAN GAMBLE, JULIA MCFADDEN, JAMES E. SHAW, ALVIN O. WHITE, Boardmembers; ROBIN COOPER by and through her parent and next friend, PATTY COOPER, VERTANZA O. CUNNINGHAM, by and through her parent and next friend VALTRICIA L. CUNNINGHAM; PEMBV GRAHAM, by and through her parent and next friend, MARTHA GRAHAM; and SHIRRISHA WHITE, by and through her parent and next friend, ALVIN WHITE,

Plaintiffs,

v.

CARROLL CAMPBELL, Governor of South Carolina; JEFFREY LAWRIMORE, GEORGE SUTTON, WESLEY KENNEDY, JAMES GUY, SARAH GALLAWAY, M. B. LEE, JR., AND TERRY WELCH, Mayor and Council Members respectively of Hemingway, South Carolina; MAYOR and TOWN COUNCIL OF HEMINGWAY; ELECTION COMMISSION OF HEMINGWAY; MANNING PATTERSON AND BETTY PATTERSON, Election Commissioners of Hemingway; EDWIN HUGGINS, WILLARD LAWRIMORE, J. WESLEY, Members of the

Hemingway Annexation Steering Committee; and the HEMINGWAY ANNEXATION STEERING COMMITTEE,

Defendants.

ORDER

for the reasons stated in the order entered by this court on January 10, 1995, the Plaintiffs' petition for attorneys' fees against Defendants Mayor and Town Council of Hemingway and Jeffery Lawrimore, George Sutton, Wesley Kennedy, James Guy, Sarah Gallaway, and M.B. Lee, Jr., mayor and council members respectively, is denied.

THEREFORE, IT IS ORDERED that the request of Plaintiffs for attorneys' fees incurred in connection with the § 5 claims be denied.

IT IS SO ORDERED.

/s/
Karen J. Williams
United States Circuit Judge

/s/
Dennis W. Shedd
United States District Judge

/s/
William B. Traxler, Jr.
United States District Judge

March 10, 1995
Florence, South Carolina

IT IS FURTHER ORDERED that the request of Plaintiffs, for attorneys' fees incurred in connection with the § 2 claims be denied.

IT IS SO ORDERED.

/s/
William B. Traxler, Jr.
United States District Judge

March 10, 1995
Florence, South Carolina

App. 14

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

P. O. Box 2087
Orangeburg, SC 29116-2087

Chambers of
Karen J. Williams
US Circuit Judge

455 Russell St.
(803) 533-0711
FAX 534-3249

April 25, 1994

Ms. Brenda Reddix-Smalls
Reddix-Smalls and Carter
P. O. Box 2073
Columbia, S.C. 29202

Ms. Eleazer R. Carter
Reddix-Smalls and Carter
P. O. Box 2073
Columbia, S.C. 29202

Mr. John S. Simmons
Willoughby & Heofer, P.A.
P. O. Box 8416
Columbia, S.C. 29202-8416

Mr. Lawrence Bradley Orr
Bridges, Porter, Orr & McEachin
P. O. Box 2427
Florence, S.C. 29503

Mr. Scott Elliott
P. O. Box 1960
Columbia, S.C. 29201

App. 15

Mr. Charles L.A. Terreni
Dibble Law Firm
P. O. Box 1240
Columbia, S.C. 29202

RE: Franklin v. Campbell,
4:93-2760-21

Dear Ladies and Gentlemen:

As you are aware, the Justice Department has again delayed ruling on the Governor's submissions. In light of the fact that their decision may have a significant impact and perhaps moot the pending section 5 issues in this case, we will defer decision on the matters argued at the hearing on February 22, 1994, including the motion to dismiss, until we receive further communication from them.

Sincerely,

Karen J. Williams

cc: Judge Shedd
Judge Traxler

(7)

FILED
JUN 23 1995
OFFICE OF THE CLERK

CASE NO.: 94-2037

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

DR. JAMES FRANKLIN, ET AL.,

APPELLANTS,

VS.

GOVERNOR DAVID BEASLEY, ET AL.,

APPELLEES.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

APPELLEES' MOTION TO DISMISS

LAWRENCE B. ORR
COUNSEL OF RECORD
BRIDGES, ORR, DERRICK AND ERVIN
POST OFFICE BOX 2527
FLORENCE, SC 29503
(803) 662-1418
ATTORNEY FOR APPELLEES

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42 U.S.C. §1973*l*(e) 4, 6, 7

MOTION

The Appellees, Jeffrey Lawrimore, George Sutton, Wesley Kennedy, James Guy, Sarah Gallaway, M. B. Lee, Jr., and Terry Welch, Mayor and Council Members of Hemingway, respectively; Mayor and Town Council of Hemingway; Election Commission of Hemingway, Manning Patterson and Betty Patterson, Election Commissioners of Hemingway, move the Court to dismiss this appeal on the grounds that the Order of the Three-Judge District Court denying the Appellants' attorney's fees is not directly appealable to the Supreme Court under the provisions of 28 U.S.C. §1253 nor under Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, but should be appealed to the Fourth Circuit Court of Appeals pursuant to 28 U.S.C. §1294.

FACTUAL BACKGROUND

The Appellants are the Superintendent of Education for Williamsburg County, several members of the Williamsburg County School Board, and several students attending Williamsburg County schools. On October 19, 1993, the Appellants instituted suit against numerous defendants alleging several causes of action. The first four causes of action were against the Appellees. The first cause of action alleged that the actions of the Appellees in annexing several areas into the Town of Hemingway without obtaining preclearance was in violation of Section 5 of the Voting Rights Act, 42 U.S.C. §1973c. The

second cause of action alleged that the annexations by the Town violated the Appellants' rights guaranteed by the Thirteenth and Fourteenth Amendments to the Constitution. The third cause of action alleged the annexations by the Town violated Section 2 of the Voting Rights Act, 42 U.S.C. §1973, and the Fourteenth and Fifteenth Amendments to the Constitution. The fourth cause of action alleged the actions of Appellees in annexing areas into the Town of Hemingway were for the purpose of denying black persons equal access to public services in violation of the Thirteenth and Fourteenth Amendments to the Constitution. A fifth cause of action was against the Governor of South Carolina and Appellees, alleging that the Town's annexations, together with the Governor's Executive Order scheduling a referendum on whether a portion of Williamsburg County should be annexed into Florence County was in violation of Section 2 of the Voting Rights Act. A sixth cause of action was against the Governor, alleging his issuance of the Executive Order concerning the County annexation referendum without preclearance was in violation of Section 5 of the Voting Rights Act.

The Appellees answered acknowledging that the Town of Hemingway had annexed several areas into the Town without obtaining preclearance and that this was in violation of Section 5 of the Voting Rights Act. The Appellees raised as a defense that a prior action had been instituted in the United States District Court for the District of South Carolina, Civil Action No. 4:93-2733-21, captioned: South Carolina Conference of

Branches of the NAACP, Williamsburg County Branch of the NAACP, Nesmith Branch of the NAACP, Stanley S. Pasley, Leroy Barcus, James Gilliard, Victor Nesmith, Reddick Williams, Bertha Gordon, Jackie McKnight, Leroy Wilson, and Patricia Washington v. Mayor and Council of Hemingway, South Carolina; Jeffrey Lawrimore, George Sutton, Wesley Kennedy, James Guy, Sarah Galloway, M.B. Lee, Jr., and Terry Welch, Mayor and Council Members respectively of Hemingway; Election Commission of Hemingway; Manning Patterson, and Betty Patterson, Election Commissioners of Hemingway; that the causes of action in that prior pending litigation were the same as the first four causes of action in the instant litigation; and that the instant litigation was duplicitous and wasteful of judicial effort.

In the NAACP case, the Plaintiffs moved for Summary Judgment on the cause of action based on Section 5 of the Voting Rights Act. The Defendants entered into a Consent Order in which the Town agreed to refrain from conducting elections in which residents of unprecleared areas voted until the annexations were precleared. The Order was entered on February 22, 1994.

The Appellants moved for Summary Judgment in this case also on the grounds that the Town's failure to obtain preclearance for the annexations violated Section 5 of the Voting Rights Act. The Appellees resisted that motion on the grounds that the Ap-

pellants as Superintendent of Education, School Board Members, and students were not registered voters and lacked standing to assert the Section 5 Voting Rights Act issues. That Motion for Summary Judgment was never ruled upon.

On January 7, 1994, the Appellants amended the Complaint to assert an additional cause of action against the Hemingway Annexation Steering Committee and against Edwin Huggins, Willard Lawrimore, and J. Wesley Kennedy as members of the Hemingway Annexation Steering Committee alleging that the Committee's actions in seeking to have a portion of Williamsburg County annexed into the adjacent Florence County was in violation of Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.

In July of 1994, the Department of Justice denied preclearance of five of the annexations by the Town of Hemingway. Those areas are no longer considered within the town limits. The Department of Justice also denied preclearance of the county annexation effort.

On September 29, 1994, the Three-Judge District Court dismissed all Section 5 causes of action as moot, ending all actions brought under 42 U.S.C. §1973c. On November 2, 1994, the Appellants petitioned for attorney's fees pursuant to§1973*l*(e). By Order dated March 10, 1995, the Three-Judge Panel of the United States District Court for the District of South Carolina

denied the Appellants' petition for attorney's fees.

The Appellants filed a notice of appeal of denial of attorney's fees for Section 5 issues to this court and a notice of appeal of denial of attorney's fees for Section 2 issues to the Fourth Circuit Court of Appeals.

ARGUMENT

Appellants seek to invoke the jurisdicition of the Supreme Court under 28 U.S.C. §2284 and 42 U.S.C. §1973c. Neither statute provides a basis for the Supreme Court to have jurisdiction to hear the denial by a District Court of a request for attorney's fees.

Changes by a covered jurisdiction in a standard, practice, or procedure with respect to voting is subject to the provisions of Section 5 of the Voting Rights Act, 42 U.S.C. §1973. That section provides, in part:

> Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Section 2284 of Title 28 provides for the composition of a three-judge district court, the method of appointment, and the authority of a single judge to act for the three-judge court. This section makes no provision for appeals.

In this case, the Appellants raised issues under Section 5 of the Voting Rights Act. The Three-Judge District Court dismissed those issues as moot in its Order of September 29, 1994. Any appeal from that order would have been appealed to the Supreme Court. No appeal was taken.

After all issues raised under 42 U.S.C. §1973c were dismissed as moot, Appellants petitioned for attorney's fees pursuant to 42 U.S.C. §1973*l*(e). There is no statutory provision for an appeal from the District Court's action on a petition for attorney's fees to be made to the Supreme Court. The appeal provisions of 42 U.S.C. §1973c are not applicable because the application for attorney's fees is not an action under Section 5.

Likewise, 28 U.S.C. §1253 does not confer jurisdiction to the Supreme Court to hear an appeal from the denial of attorney's fees. That section provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by Act of Congress to be heard and determined by a district court of three judges.

Appellants are not appealing the granting or denying of an injunction. This jurisdictional provision has no application to an appeal from the denial of attorney's fees alone. Supreme Court

of Virginia v. Consumers Union of the United States, Inc., 446 U.S. 719, 736, n.16 (1980).

An appeal of a three-judge court order on attorney's fees lies to the Court of Appeals for the circuit embracing the district. 28 U.S.C. §1294. It does not lie to the Supreme Court. Clinton v. Jeffers, 503 U.S. 930 (1992); Watkins v. Fordice, 7 F.3d 453(5th Cir. 1993).

CONCLUSION

The Three-Judge District Court dismissed as moot the Appellants' actions arising under Section 5 of the Voting Rights Act. The District Court's order denying attorney's fees sought under 42 U.S.C. §1973*l*(e) is appealable to the Fourth Circuit Court of Appeals, not the Supreme Court. The appeal should be dismissed for lack of jurisdiction.

Lawrence B. Orr
LAWRENCE B. ORR
COUNSEL OF RECORD
BRIDGES, ORR, DERRICK AND ERVIN
318 West Palmetto Street
Post Office Box 2527
Florence, SC 29503
(803) 662-1418
ATTORNEY FOR APPELLEES

Florence, South Carolina
June 22, 1995